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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/489,310	01/21/2000	Gary Stephenson	7922	5677

27752 7590 06/06/2005

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EXAMINER

KRASS, FREDERICK F

ART UNIT PAPER NUMBER

1614

DATE MAILED: 06/06/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

## Office Action Summary

Application No.

09/489,310

Applicant(s)

STEPHENSON, GARY

Examiner

Frederick F. Krass

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1614

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 08 April 2005 (RCE Request).
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 23-31 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 23-31 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |  |   |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)   | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)                                   | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152)             |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)<br>Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____  |

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### Anticipation Rejection

The rejection of claims 23-31 under 35 U.S.C. 102(b) as being anticipated by Kohl et al is maintained.

Although the rejection remains the same, given the tortured history of this case the examiner has exercised his discretion in making this action NON-FINAL, in the interest of fairness, due to a shift in reasoning, and in order to permit Applicant optimal flexibility in responding thereto.

Although Applicant has adopted the "in need thereof" language suggested by the examiner, the comments made in the response make clear that the examiner's reasoning has not been accepted:

As stated throughout the present specification, drinking low pH beverages contributes to dental erosion. Thus anyone drinking a low pH beverage composition is in need of the compositions of the present invention. On a broader scale, all mammals need liquids to survive, so to a certain extent, we are always in need of beverages.

Whether true or not, these statements nullify the use of "in need thereof" as distinguishing language since, as set forth at the passage bridging pp. 1333 and 1334 of the Jansen decision, the term "in need thereof" must be considered in light of the prosecution history. By making the above statement, Applicant casts doubt – on the record - on the adequacy of "in need thereof" as distinguishing language.

Accordingly, the examiner now suggests amending claim 23 as follows:

A method of treating dental erosion comprising orally administering to a mammal who has been directed to ingest, for the purpose of treating said dental erosion, a beverage composition having a pH of less than about 5...

This language is taken from the instant specification at page 5, lines 7-25, and would appear to adequately distinguish those who have either decided, e.g. after reading a product label, or been specifically instructed, e.g. by a physician, to use the instant polyphosphates to inhibit tooth erosion, from just anybody drinking a beverage.

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### Correspondence

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Frederick F. Krass whose telephone number is 571-272-0580. The examiner's schedule is as follows:

Monday: 10:30AM- 7PM;  
Tuesday: 10:30AM - 7PM;  
Wednesday: off;  
Thursday: 10:30AM- 7PM; and  
Friday: 10:30AM-7PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Christopher Low can be reached at 571-272-0951. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Frederick Krass  
Primary Examiner  
Art Unit 1614

